United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

vs.

JOHN CAPRA,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

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DEFENDANT-APPELLANT'S REPLY BRIEF

BARRY IVAN SLOTNICK
Attorney for Defendant-Appellant
15 Park Row
New York, N.Y. 10038
212-233-5390

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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STATEMENT

That on or about the first day of May, 1974, the Government filed their brief composed of some 88 pages. In view of the 7 pages dedicated to the "publicity" point raised by Capra* and his co-appellants, a brief reply is mandated. (See Prosecution's brief, [hereinafter U.S. Br.], at Pages 63-69.)

ARGUMENT

The Government's memorandum commences with a total misunderstanding, misinterpretation or avoidance of Capra's point** as placed before this Court -- and ends with such indignation so as to be an indication of the Government's

*Capra's Point I was -- "Governmental Action Resulting In Massive And Lurid Publicity Has So Prejudiced The Due Administration Of Justice That The Convictions must be set aside.

**Joined in by Guarino and DellaCava

true position*** with regard to the issue herein. We are constrained to reproduce in part the Government's response.

> "However, in the Government's view it was not improper for the press to be present at the preliminary briefing or to obtain information concerning the facts surrounding the arrests from Government agents. Almost all of the information reported by the press concerning the arrest of Capra, for example, would have been properly disseminated by attorneys for the Government under Rule 8 of the Southern District's Criminal Rules, which, in any event, does not apply to law enforcement agencies. More important, while we believe strongly that defendants are entitled to a trial untained by prejudicial publicity, we think that it is also important that, consistent with Rule 8 and Justice Department regulations, arrests and indictments in narcotics cases be the subject of

***Unfortunately, the continual thirst for publicity with regard to mass arrests pervades the New York area -- as this brief is being written the Office of the Special Prosecutor of the Attorney General of the State of New York, Maurice Nadjari, has publicly accused the Federal Prosecutors with being publicity prone and purposely leaking information to the press prior to prosecutions. The squabble between both arms of law enforcement is regrettable, unfortunate and ill conceived. However, it merely highlights the true role that publicity plays in the offices of the prosecution -- unfortunately, it is not limited to the prosecutor in the Southern District of New York. The practice of pre-indictment announcements, unnecessary cooperation with the mass media and rank desire for publicity should be condemned and rectified by this Court through the use of its supervisory power, etc.

> news coverage as a warning to narcotics dealers that they ply their trade at their peril. To the extent that Justice Department guidelines were violated by the presence of reporters at Capra's arrest, the disapproval of this Office was made known at the time. ... While Judge Frankel calls this strategy "unacceptable" and "impotent" and suggests that we should follow the British practice (presumably in their restriction on certain kinds of news reporting activities), the suggestion would appear to ignore the First Amendment to the Constitution." (U.S. Br. page 69, emphasis ours.)

The aforementioned response comes after a series of "troubled" statements by the Trial Court together with its lengthy Memorandum on Pretrial Publicity (App.163) and further emphasized by the statements of the Court below at sentencing (App. - Volume 7 -see "Sentencing Minutes" -- pages 2-4.)

The Government's basic argument with regard to the "Publicity" issue indicates that identifiable prejudice has not been shown and therefore relief is to be denied the appellants. However, we cite the "Government's Supplemental Memorandum Response to Defendants Motions For a New Trial," (United States of America v. Ralph Jacobson et al, 73 Cr. 522 USDC EDNY):

> "The general rule in cases where a claim of deprivation of due process has been made is that a showing of Identifiable Prejudice must be made in order to sustain such claim. Exceptions to this rule had been recognized in cases where Governmental actions or procedures involved such a

high probability that prejudice would result that they are deemed 'inherently lacking in due process.' Estes v. Texas, 381 US 532, 542-43 (1965).

While the Second Circuit Court of appeals has applied the 'probability of prejudice' standard to a case where no governmental action contributed ... it is significant that every Supreme Court case cited in support of the holding involved some inherently prejudicial Governmental action or procedure. United States ex rel Owen v. McMann, 435 F. 2d813 (2d Cir. 1970) ...

Despite the holdings in United States ex rel Owen v. McMann, 435 2d813 (2d Cir. 1970), the government contends that the 'probability of prejudice' standard should be applied only in cases involving an objectionable governmental procedure or action. See also United States v. Rattenni, 480 F. 2d195 (2d Cir. 1973).

... A careful reading of Remmer (347 US 227 (1954)) reveals that the burden shifts only where the Government is in some way responsible ... " (pgs. 3-6)

We emphasize that in the aforementioned Jacobson Memorandum submitted by the government, the Special Attorney indicated that where there is some "governmental contact responsible for the publicity", the burden shirts to the government.

We fully agree with the government's submission in that case. It is necessary to view the record as an

entirety so as to see the constant haze surrounding this case with regard to "official action" in this case.

This matter must be the subject for remedial action by this Court especially in view of the position taken by the Government in this case.

A positive principal was established by this Court when it stated in United States Pfingst, 477 F. 2d177 (1973):

> "We see no need whatsoever for further deterrent action as the Assistant United States Attorney has been warned by the District Court and has freely admitted the error." Pg. 189

In this matter not only has the Assistant United States Attorney been warned by the District Court but he has also not freely admitted the error-which he attempts to defend rather than admit.

The Government further attempts to disavow itself from what occurred by placing the blame elsewhere and indicating its "disapproval". However, as the trial record so completely indicates ... "It was a joint operation." (298) Not only were New York City police officers chauffeuring men from the mass media (306,310,319,330-331) but so were special agents of the Bureau of Narcotics and Dangerous Drugs (435,437,441,

456). It is to be noted that Capra was arrested at 6:00 a.m. on the morning of April 14, 1973. At approximately 1:00 a.m. of that morning, his house was surrounded by detectives and agents carrying members of the press*.

Certainly, the exhibits illustrate the "joint" nature of the arrest together with the attendant publicity. (Vol. VII app. E-1 to E-22; specifically see E-19, E-12 and E-14.) It is interesting to note that photographs of the Defendant Capra in custody and being brought to the headquarters of the Bureau of Narcotics and Dangerous Drugs were even taken from Agents' automobiles (E-20).

The government further indicates in a rather soft manner that a question of "waiver" appears on the horizon -- together with the fact that the publicity did not prejudice

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*Cross-examination of Special Agent Allen.

Q. "And who did you leave with?
A. With Detective Gillespie, Detective DeMarco, Special Agent Sokel, myself -- myself, several members of the press.

Q. How many members of the press?
A. I left with 2. I believe there may have been 3 ...

Q. How many people were in your Government vehicle? ...
A. There was Special Agent Sokel, myself and 2 members of the press ... I was told they would be assigned to our 4-man team ... one came from, I believe, with the New York Magazine. The other one was from the Daily News." (pgs. 435 and 456)

the defendants at the trial.

The appellants refute both -- by indicating that the point of "Publicity" so raised is not the fact that the publicity had a specific impact on any one juror but that the dissemination of the publicity by the government in the manner in which it was done was totally improper and warrants remedial action. It is further indicated that there was an atmosphere created which Judge Frankel analogized to a "circus" and which this Court on a prior occasion discussed with regard to "carnival". See U.S.A. v. Pfingst, supra, pg. 186.

As the Government correctly indicates "the question of publicity first arose during a hearing on one of Capra's pre-trial motions held on September 18, 1973. (U.S. Br. at pg. 63). Certainly, the aspect of Government dissemination was first learned of at the hearing when Detective Gillespie testified that he was "driving" a member of the press prior to his arrest of the Defendant Capra.

The fact that the Government accommodated and made arrangements for the dissemination of publicity is a matter which should be looked at severely by this Court. Counsel as he indicated to the Court below learned for the first time of the Government's action with regard to aiding the dissemination of publicity (293,294,296,298,299,306,310,311,319,330-331)

THE COURT: ...If you later have a point, a motion, a contention that gets to the front of your mind and can be formulated in terms of law, I'll hear it. ..." (303,307)

The aforementioned colloquy took place during the course of Detective Gillespie's cross-examination -- the first time that Capra's counsel learned that the law enforcement agents were driving with newsmen in their automobiles.

Clearly, Capra's counsel raised the issue when he first learned of it.

The issue is not one of First Amendment dimension.

It was not something that he might normally have known. It was just brought out upon the testimony of the police officer which was later mirrored by Agent Allen's testimony to his similar experience.

The record indicates that it seemed totally incredible for such "chauffeuring" activity to be carried on by the prosecution prior to the arrest of the defendant. The pages of the hearing which reflect Sgt. Gillespie's cross-examination are fraught with counsel's disbelief and the Court's disapproval.

at this hearing.

The issue of the Governmental action in this matter was timely and aptly raised by Capra's Counsel:

> "...My concern is as to one of Mr. Capra's rights, which was to be arrested without this type of publicity...I am very concerned about the fact that there was a New York Magazine, a New York Times man, a Daily News man, varous other people from the media brought there by the Police Department.
>
> I think that they have exceeded the bounds of propriety...There is an issue at this point now of...the propriety of the arrest. The police brought these people there.
>
> THE COURT: ...It may go to something else some other time.
>
> MR. SLOTNICK: Yes. I would also like to find out, because again the novelty of the issue is not the publicity issue but the propriety of the police and agents exhibiting this type of conduct.
>
> Somewhere in the back of my mind it suggests to me that there is some sort of a violation of his rights to have this thing occur.
>
> I never, in my wildest dreams, and I say this in good faith before the Court, believe that the police would ferret around with them photographers from the Daily News taking pictures of an arrest. I don't know where they were stationed. I know that there was a photographer outside his home. As he walked out a picture was taken and he was told that "That's an Agent."

Regrettably, the extent of the publicity continued causing Judge Frankel to make his further comments at sentencing*.

The Prosecution's Brief contained such significant omissions, distortions and misstatements of fact that these few words of reply were imperatively required.

The Prosecution has asked this Court to sweep under the rug all of the reprehensible conduct that admittedly occurred in this case, has misstated petitioner's argument in its main brief and has even defiantly indicated that what occurred was not as improper as it sounds.

It is respectfully submitted that it is now even more clear that the judgment of the Lower Court should be reversed.

Respectfully submitted,

BARRY IVAN SLOTNICK
Attorney for Defendant Capra

Dated: May 7, 1974.

* As reflected in the Government's brief (U.S. Br. 65) and the Joint Appendix filed by all Defendant-Appellants Capra, Guarino & DellaCava (Volume VII -Sentencing Minutes).

N. L. v. Ogden

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at **286 Richmond Avenue, Staten Island, N.Y. 10302.** That on the 9 day of May, 19 74 at No. N.Y. Courthouse, N.Y.C. deponent served the within ~~Brief~~ ~~Motion~~ N.L. attorney upon ~~Whitman~~ the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 9 day of May 1974

Edward Bailey

William Bailey
.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975

Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAWRENCE S. FELD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of May, 1974 he served 2 copies of the within BRIEF ~~(Page Proofs)~~ by placing the same in a properly postpaid franked envelope addressed:

To the attorneys named on the annexed list.

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lawrence S. Feld
LAWRENCE S. FELD

Sworn to before me this
6th day of May, 1974

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

LSF:sk

Barry Ivan Slotnick, Esq.
15 Park Row
New York, New York 10038

George L. Santangelo, Esq.
253 Broadway
New York, New York 10007

Lawrence Stern, Esq.
343 West 29th Street
New York, New York 10001

Leonard J. Levenson, Esq.
11 Park Place
New York, New York 10007

Joseph I. Stone, Esq.
277 Broadway
New York, New York